

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAVIER BARAJA RAMIREZ,

Defendant.

No. **CR02-3008MWB**

**REPORT AND RECOMMENDATION
ON MOTION TO SUPPRESS**

This matter is before the court on the defendant's motion to suppress and supporting brief (Doc. Nos. 13 & 14), filed March 19, 2002. The plaintiff (the "Government") filed a resistance on March 25, 2002 (Doc. No. 15). Pursuant to the trial scheduling and management order filed February 20, 2002 (Doc. No. 10), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge in accordance with 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. Accordingly, the court held a hearing on the defendant's motion on April 5, 2002. Assistant U.S. Attorney C.J. Williams appeared for the Government. The defendant appeared in person with his attorney, Patrick Parry.

At the hearing, the Government offered the testimony of Iowa State Patrol Troopers Matthew Anderson ("Trooper Anderson"), Chris Callaway ("Trooper Callaway"), and Mark Anderson ("Trooper Mark Anderson"), and Special Agent Lori A. Lewis ("Agent Lewis"). The Government also offered the following three exhibits, each of which was admitted without objection: Gov't Ex. 1: Videotape of traffic stop; Gov't Ex. 2: Copy of

consent to search form signed by the defendant; Gov't Ex. 3: Copy of English translation of consent to search form.

The court has reviewed the parties' briefs and carefully considered the evidence, and now considers the motion ready for decision.

FACTUAL BACKGROUND

On February 2, 2002, at 11:30 a.m., Trooper Anderson was on routine patrol in Cerro Gordo County. He was entering northbound I-35 at about the 195 mile marker. As he came up onto the highway from the entrance ramp, Trooper Anderson saw a white Ford Expedition (the "Ford") in the left-hand lane of the highway. The Ford was passing several vehicles, and Trooper Anderson thought the Ford might be speeding. Trooper Anderson got onto the highway, moved into the left-hand lane, got behind the Ford, and attempted to get a pace on the Ford. The Ford slowed down and changed lanes into the right lane. Trooper Anderson moved into the right lane behind the Ford, activated his radar, and clocked the Ford at 70 mph in a 65 mph zone. The Trooper activated his emergency lights, which automatically activated the video camera in the trooper's patrol car.¹

The Ford pulled over onto the right shoulder of the highway and stopped. The defendant was driving, and was the only person in the Ford. The Trooper approached the Ford from the passenger side, spoke with the defendant through the passenger window, and told the defendant he had been stopped for speeding. The Trooper asked to see the temporary tag that was in the vehicle, and the defendant gave him the tag and the Ford's registration documents. The defendant then went to the Trooper's patrol car and sat in the passenger seat.

¹Gov't Ex. 1 is a copy of the videotape recorded by the on-board video camera. The tape is of poor quality, with intermittent sound and picture throughout. The Trooper testified his VCR was replaced a week after this traffic stop because the head was bad.

The Trooper ran the defendant's driver's license and found it was valid. He also confirmed there were no outstanding warrants and no criminal history on the defendant. The Trooper began writing the defendant a warning for speeding, and while he was doing so, the Trooper asked the defendant where he was going, coming from, and the like. The defendant said he was going to visit his uncle in "West Paul," which he later acknowledged was Minneapolis. The defendant did not know where his uncle lived and had no phone number for him, but said he was supposed to meet his uncle at a Days Inn where they had stayed previously. The defendant said his uncle had given him \$3,000 toward the purchase of the Ford, which they bought in San Antonio. His uncle flew back to Minneapolis, and the defendant was to drive the vehicle up and meet him there.

The Trooper looked at the Ford's insurance documents to be sure the Ford was insured. The insurance documents said the defendant was unemployed. The defendant told the Trooper he was an electrical worker, but he had undergone surgery on his right shoulder and he was unable to work at that time.

The Trooper finished writing the warning and gave it to the defendant. The defendant acknowledged that he had been going a little bit over the speed limit, stating he normally tries to stay close to the posted limit. The defendant said he had received a ticket in California, for going about 10 mph over the speed limit.

After issuing the warning, the Trooper advised the defendant the traffic stop was over. He then asked if the defendant would mind answering some questions. The defendant stated he was a little hungry, but he did not object to the Trooper asking some questions. The Trooper testified the defendant was friendly, and was not acting nervous or scared at this point. The Trooper asked if the defendant had any narcotics in the Ford, and the defendant said, "No." The Trooper asked about specific types of drugs, naming each of them. When asked if he had any cocaine, the defendant responded, "No." When asked if he had any marijuana, the defendant said "No," and said he did not smoke cigars. When

asked if he had any methamphetamine, the defendant stated he had some stomach medicine in the Ford.

The Trooper then asked if he could search the Ford, and the defendant said, "If you want to."² The Trooper asked if the defendant could read Spanish, and the defendant said he could. The Trooper presented the defendant with a consent to search form in Spanish, which the defendant signed. (Gov't Ex. 2)³ The Trooper added the date and time to the form. The defendant did not ask any questions about the form before he signed it, and he did not object in any way to signing the form. The Trooper did not read the form out loud to the defendant or tell him he could refuse the search; he simply advised the defendant to read the form. The defendant's demeanor at that time was helpful; in fact, he offered to drive the vehicle to a safer location for the Trooper to search it. The Trooper told the defendant that would not be necessary.

The Trooper showed the defendant how to adjust the temperature inside the patrol car so he would remain comfortable.⁴ He also honked the horn to show the defendant how to get his attention if the defendant wanted to talk to him. The defendant remained in the heated patrol car while the Trooper searched the Ford. He began his search on the passenger side, starting with the air bag compartment. The Trooper testified that area of a vehicle is sometimes altered to make a compartment to transport drugs. He looked into

²The defendant's consent to the search is audible on the videotape (Gov't Ex. 1), at approximately 11:45 a.m., about 15 minutes after the initial stop.

³Gov't Ex. 2 also contains an English translation of the form, on the right-hand side. Because the copy was partially cut off, the Government also submitted Ex. 3, a full copy of the English version of the consent form.

The Trooper testified the handwritten notes "reason" and "result" were not on the form at the time it was presented to the defendant for his signature. The Trooper put those notes on the form shortly after the stop to remind himself of why he had asked for consent to search the Ford.

⁴The Trooper testified it was quite cold outside on the day of the stop.

the Ford's glove box and saw some bolts that seemed to have been removed and replaced repeatedly; they appeared almost stripped. There was a large, white, shiny container, and on the right side was a heater box that had been cut off at the top. It appeared some modifications had been done to the area that were not standard equipment on the Ford. The Trooper started to check the airbag light and noticed the keys were not in the Ford, so he returned to the patrol car and obtained the keys from the defendant. The defendant still offered no objection or comment about the search.

The Trooper went back to the Ford, on the driver's side, and turned the ignition to the "on" position. The airbag light came on and then went off as it properly should. He went back to the passenger side and checked the vent closest to the door to see if air was circulating through that vent. The Trooper explained that if there was a compartment built into the airbag space, then air normally would not come out of that side vent. Air was circulating normally.

The Trooper completed his search of the Ford and then returned to the patrol car to talk with the defendant. He was concerned about the suspected modifications in the glove box area. He asked the defendant if the Ford had ever been damaged, as in an accident. The defendant said yes, the Ford had been damaged on the rear end and side. The defendant's response did not alleviate the Trooper's concerns; rather, his concerns were heightened because the apparent modification was not where the Ford was supposed to have been damaged. The Trooper told the defendant of his concerns about the glove box/airbag area, and asked the defendant for consent to continue searching that specific area. The defendant agreed, still offering no protest and not asking any questions. Nor had the defendant honked the horn or otherwise tried to get the Trooper's attention during the search.

Notably, all of the Trooper's conversation with the defendant was in English. The defendant seemed to have no real difficulty understanding what the Trooper said, and for the most part, the Trooper also had no difficulty understanding the defendant.

The Trooper went back to the Ford and removed the molding around the stereo area and the controls for the heating vents and air conditioning unit. When he did so, he could see another piece of material that appeared to have been cut. The bottom side of the dash had been glued with what appeared to be non-factory glue. In that area, the box was completely white, while everything else in the Ford's interior was green.

Soon thereafter, the Trooper was contacted by Trooper Callaway, who called on his cell phone to see if Trooper Anderson had lunch plans. Trooper Anderson said he was on a traffic stop, and thought he had a vehicle that had been modified. Trooper Callaway had undergone special training in narcotics interdiction, and in the types of hidden compartments used by drug traffickers to conceal drugs in vehicles. He said he would come to the location to assist Trooper Anderson. Because of the cold, Trooper Anderson went back to his patrol car to await the arrival of Trooper Callaway.

By this time, the traffic stop had lasted about 40 minutes. Trooper Anderson engaged in further conversation with the defendant while they waited for Trooper Callaway to arrive. The defendant still offered no protest of the search or of the delay, and Trooper Anderson testified the defendant's demeanor was "normal."

When Trooper Callaway arrived at the scene, Trooper Anderson got out of the patrol car and explained the facts of the stop to Trooper Callaway. He showed Trooper Callaway the area of concern in the Ford. Trooper Callaway asked where the Bounce was, referring to Bounce dryer sheets. Trooper Anderson had not found any dryer sheets, but Trooper Callaway had immediately noticed a strong odor of dryer sheets.⁵

The Troopers decided Trooper Callaway would go to a Ford dealership a few miles away to see if they had a similar model Expedition, so he could compare the glove box/airbag area and see if it looked the same as the defendant's Ford. While he was gone,

⁵Trooper Callaway testified Bounce and similar dryer sheets often are used in an attempt to mask the smell of narcotics from K-9 units.

Trooper Anderson stayed in the patrol car with the defendant, making conversation. The defendant still did not protest the search, nor did he ask if he could leave. Trooper Callaway called back on the radio and said the Ford dealership had an Expedition that was identical to the defendant's except for the color. Trooper Callaway opened the glove box in the vehicle at the dealership and noticed everything underneath was different from what the Troopers had observed in the defendant's vehicle. Trooper Callaway relayed this information to Trooper Anderson, and then Trooper Callaway returned to the scene and pointed out the things that were different about the defendant's vehicle.

Trooper Callaway got into the back seat of the patrol car and talked with the defendant. He told the defendant his vehicle was different from an identical one at the Ford dealership, and said the Troopers had some concern about contraband being hidden in the vehicle. He said the Troopers wanted to take a closer look at the vehicle, and asked the defendant if he would be willing to drive the Ford to another location where it would be warmer and the Troopers would have access to some tools that were not available to them at the scene. The defendant agreed. Trooper Callaway led the way in his patrol car, the defendant followed in the Ford, and Trooper Anderson brought up the rear in his patrol car. They drove to Meyers Towing in Clear Lake, Iowa, which was about five miles south of the area where the traffic stop occurred.

The Ford was driven into a garage at Meyers. The defendant got into Trooper Anderson's patrol car, and the two of them drove to McDonald's to get food for the defendant and the two Troopers. The defendant still made no protest of the search, the scope of the search, or the length of time since the traffic stop ensued. When they returned to Meyers, the defendant sat in a chair at the right rear of the vehicle and ate his food while the Troopers searched the Ford. The defendant was still friendly, cooperative, and not exhibiting any signs of agitation.

The Troopers removed the windshield wipers and the plastic flashing directly below the wipers. At that point, an area that had been bonded was clearly visible because the bond had cracked. The Troopers borrowed a drill from a Meyers employee and drilled a hole into the bonded area. The drill slipped through and hit what felt like a soft package. When they pulled the drill out, the drill bit was covered with a white powdery substance. At this point, they placed the defendant in handcuffs, searched his person, and advised him of his rights in English. The defendant said he did not understand. Trooper Anderson keeps a Spanish version of the *Miranda* warnings in his patrol car which he provided to the defendant and asked him to read it. The defendant complied, and then said he did understand his rights. The Troopers then removed the handcuffs, and told the defendant to sit back down in the chair at the rear of the Ford while they finished their search. Trooper Anderson testified that from then on, the defendant “couldn’t stay sitting down.” He would stand up, sit down, and pace around in small circles, and he was breathing heavily; his breathing was audible from 12 feet away. Trooper Callaway stated the defendant was “slowly getting worked up” and “seemed to be under a lot of stress.”

The Troopers finished searching the compartment in the Ford. They removed 25 duct-taped packages from the compartment. They field-tested the white powder in one of the packages, and it was positive for methamphetamine. All the drugs were submitted to the DCI lab, and came back positive for methamphetamine. In total, the packages contained around 35 pounds of methamphetamine.

After the Troopers finished removing the drugs from the Ford, they talked with the defendant further about where he was headed, and asked if he wanted to cooperate in a controlled delivery of the Ford to his destination. The defendant said he was willing to

cooperate. Trooper Mark Anderson⁶ and Agent Lori Lewis were called in to assist in the operation. Trooper Callaway contacted the Minnesota Bureau of Criminal Apprehension (“BCA”) to advise them of the operation. He had a Spanish-speaking BCA agent talk to the defendant by phone to see if he could glean any additional details about the defendant’s trip, and to make sure the defendant understood fully what was happening. The BCA agent did not learn any additional facts about the defendant’s trip beyond what the defendant had already told the Troopers. Troopers Anderson and Callaway and Agent Lewis then left Meyers to go home and get clothing for an overnight trip to Minneapolis. Trooper Mark Anderson stayed at Meyers with the defendant.

While they were waiting, the defendant asked Trooper Mark Anderson if the trooper thought the defendant should get an attorney. Trooper Mark Anderson replied that it was totally the defendant’s choice, and if he wanted an attorney, the officers would get one for him. When the other officers returned to the scene, Trooper Mark Anderson immediately told Agent Lewis of the defendant’s question. Prior to this time, Agent Lewis had not had any contact with the defendant. After learning of his question, Agent Lewis spoke with the defendant and told him if he wanted an attorney, that was his option and they would make arrangements if he wanted to speak with an attorney. The defendant indicated he wanted to continue cooperating with the controlled delivery of the vehicle. Agent Lewis testified no promises or guarantees were made to solicit the defendant’s cooperation, and the defendant did not allege any promises had been made to him. Agent Lewis’s only other conversation with the defendant before they left Meyers was to ask if he needed to use the restroom.

The defendant rode to Minneapolis with Agent Lewis and Trooper Anderson, while Trooper Callaway drove the Ford. (Trooper Mark Anderson did not make the trip to

⁶Trooper Mark Anderson is Trooper Matthew Anderson’s brother.

Minneapolis.) On the trip north, the defendant did not make any reference to wanting an attorney, wanting to remain silent, or any desire to stop cooperating or end the trip.

When they arrived in Minneapolis, Agent Lewis and Trooper Callaway went to BCA headquarters, while Trooper Anderson, the defendant, and a BCA agent went to find the Days Inn where the defendant allegedly was supposed to meet his uncle. They drove to several Days Inns in the Minneapolis area, driving around for about two hours. The defendant said he could not remember which Days Inn was the right one. They finally gave up and went back to BCA headquarters. During the two hours they drove around, the defendant never asked for a lawyer, never said he wanted to remain silent, and never indicated he wanted to quit cooperating.

At BCA headquarters, the defendant was taken up to the office area. Trooper Callaway talked with the defendant briefly, telling him, "All we need is the truth." He felt the defendant was not being truthful about not knowing which Days Inn was the correct one. That was the last conversation Trooper Callaway had with the defendant.

Later, Agent Lewis and a BCA officer talked with the defendant. They told the defendant his story did not make sense to them. They did not believe he would travel from California to Minnesota, without having any means of contacting his uncle during the trip. The defendant asked if he could call his wife, and a phone was provided to him for that purpose. He made a phone call but did not reach anyone, and he commented that he thought his head was going to explode. Then he said he wanted to speak with an attorney.

The officers immediately ceased questioning the defendant. The Iowa officers packed up their belongings, put the defendant back in Agent Lewis's vehicle, and drove back to Iowa. No one attempted to question the defendant at any time during the return trip, and the defendant made no voluntary statements during the trip. The only conversation anyone had with the defendant was when they stopped for gas about 40 miles south of Minneapolis. The defendant asked for a cough drop from the Ford, and Trooper Anderson got a package

of cough drops from the Ford and gave them to the defendant. Everyone drove back to Meyers to leave the Ford there, and then Trooper Anderson took the defendant to the Cerro Gordo County jail.

Trooper Anderson and the defendant arrived at the jail at approximately 3:30 a.m. on February 3, 2002. They pulled into the garage area, and got on an elevator to ride up to the third floor, where the jail is located. When they reached the booking area, Trooper Anderson could see the defendant was 'getting stressed out.' "Out of nowhere, he stated he didn't need this fucking shit." Immediately after making this statement, the defendant said he feared "they" were going to kill his family, and he kept repeating that he was in trouble. These statements were not made in response to any questioning; they were made voluntarily by the defendant. Trooper Anderson finally responded, saying the officers had just spent the last six hours trying to help the defendant out. The defendant looked back at Trooper Anderson, and then blurted out a series of statements about being paid \$2,000 up front to deliver the Ford, and he was to receive another \$6,000 when he arrived in Minnesota. He said the Ford had been registered in his name to make it look good. He was to leave the Ford in Minnesota, and then fly back home. Trooper Anderson still had not asked the defendant any questions; all these statements were totally unsolicited.

Trooper Anderson then asked the defendant if the Ford was his, and the defendant said it was not. Trooper Anderson asked him some questions about the nature of his trip. The defendant asked if he could try to reach his wife again. He was provided with a phone and was able to reach his wife. When he got off the phone, the defendant was crying, obviously upset, said it "wasn't worth it," cussed a lot, and then asked to talk to an attorney. Trooper Anderson got the Yellow Pages from the jail, took the defendant into the next room, opened the phone book to the attorney section, and told the defendant he could call whomever he wanted. Trooper Anderson did not ask the defendant any other questions, and the Trooper left shortly thereafter. No one else questioned the defendant.

DISCUSSION

Very little analysis is required to dispose of the defendant's motion to suppress. The defendant argues the officers lacked probable cause to stop the Ford, because he was not exceeding the speed limit. (Doc. No. 13, ¶ 2) He also argues he did not consent to a search of the Ford, and his subsequent requests for an attorney were ignored by law enforcement officers. (*Id.*, ¶ 3)

There simply is no evidence in the record to support any of the defendant's allegations. The record shows the defendant was traveling over the speed limit; indeed, he admitted this fact to Trooper Anderson. His consent to the search of the vehicle is audible on the videotape of the traffic stop. The record shows the defendant understood English well enough to converse at length with Trooper Anderson at the scene of the traffic stop, and to converse with the other officers involved in the investigation. Furthermore, he was provided with a Spanish version of his *Miranda* rights, and he was given the opportunity to speak to a Spanish-speaking BCA agent to be sure he understood his rights.

The record also shows the officers responded appropriately when the defendant asked if he should speak with an attorney, telling him it was entirely his choice and they would provide an attorney if he wanted one. When the defendant later expressly asked to speak to an attorney, all questioning stopped; all the defendant's further statements were volunteered and not made in response to questioning.

The only possible issue for the court's consideration is whether the defendant's question to Trooper Mark Anderson as to whether the Trooper thought the defendant should talk to an attorney before proceeding could be construed as an actual request to speak with an attorney. In *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the Supreme Court held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

communication, exchanges, or conversations with the police.” *Id.*, 451 U.S. at 484-485, 101 S. Ct. 1880 at 1884-1885. *See also Winnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) (*Edwards* rule applies to prohibit police from reinitiating interrogation even after the accused has consulted with an attorney).

In order to determine whether the “rigid prophylactic rule” of *Edwards* applies in a given situation, courts must determine whether the accused has actually invoked his right to counsel. *Davis v. United States*, 512 U.S. 452-53, 458 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994) (suspect must unambiguously request counsel) (citing *Smith v. Illinois*, 469 U.S. 91, 95, 105 S. Ct. 490, 492, 83 L. Ed. 2d 488 (1984) (*per curiam*), quoting *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S. Ct. 2560, 2569, 61 L. Ed. 2d 197 (1979)); *see also McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209, 115 L. Ed. 2d 158 (1991). Only an unambiguous request for counsel will require officers to cease questioning. *Davis*, 512 U.S. at 459.

In the present case, the defendant’s initial question to Trooper Mark Anderson did not constitute an unambiguous request to speak to an attorney. Nor did the defendant ask for an attorney when Agent Lewis offered him the opportunity. His first unambiguous request to speak to an attorney occurred at the BCA office, after which all questioning ceased and the defendant was returned to Iowa.

The statements the defendant made at the Cerro Gordo County jail were not in response to any actions or questioning on the part of Trooper Anderson, but were totally voluntary. After the defendant reinitiated contact, Trooper Anderson asked a few more questions, but when the defendant again said he wanted to talk to an attorney, Trooper Anderson immediately stopped all questioning and left the premises.

There is nothing whatsoever in this record to indicate any of the law enforcement officers involved in the traffic stop and subsequent investigation acted in any manner that

was not entirely appropriate under the circumstances. There simply is no basis whatsoever on this record to sustain any part of the defendant's motion to suppress.

CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections⁷ to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that the defendant's motion to suppress evidence be **denied**.

IT IS SO ORDERED.

DATED this 16th day of April, 2002.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

⁷Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).